

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

BEFORE THE INDIANA
COMMISSIONER OF INSURANCE

CAUSE NUMBER: 5480-AG07-1219-309
5990-AG07-1219-310
5993-AG07-1219-311
6009-AG07-1219-312
6019-AG07-1219-313
6020-AG07-1219-314
6047-AG07-1219-315
6144-AG07-1219-316
6146-AG07-1219-317

IN THE MATTER OF:)

Marcus Schrenker)
11206 Fall Creek Road)
Indianapolis, Indiana 46256)

Indiana Resident)
Producer License No.: 2417160)

Heritage Wealth Management, Inc.)
11206 Fall Creek Road)
Indianapolis, Indiana 46256)

Indiana Resident)
Producer License No.: 33579)

Types of Agency Action: Enforcement)

FILED

MAR 19 2009

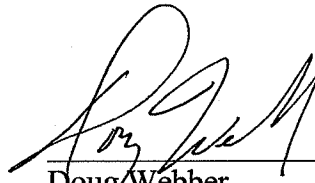
STATE OF INDIANA
DEPT. OF INSURANCE

NOTICE OF FILING FINAL ORDER

The parties to this action are hereby notified that the Final Order is deemed filed as of this date.

Either party may petition for a rehearing. A petition for rehearing may be granted only if the Respondent is not in default; newly discovered material evidence exists; and the evidence could not through the exercise of due diligence have been discovered and

produced at the hearing. The Respondent has the right to seek judicial review under IC
4-21.5-5.

A handwritten signature in black ink, appearing to read 'Doug Webber', is written over a horizontal line.

Doug Webber
Administrative Law Judge and
Appointed Ultimate Authority

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FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER

Comes now the Administrative Law Judge ("ALJ") and Ultimate Authority, Doug Webber, having considered and reviewed all of the evidence, will now render a decision in the matter of Respondents' Marcus Schrenker and Heritage Wealth Management, Inc.

By Order dated January 16, 2009, Commissioner Jim Atterholt appointed Doug Webber the ultimate authority in this matter pursuant to Ind. Code 4-21.5-3-9; 4-21.5-3-28. Hearings were held on August 19, 2008, September 18, 2008, November 18, 2008, and January 22, 2009,

at the offices of the Indiana Department of Insurance, 311 West Washington Street, Suite 300, Indianapolis, Indiana 46204.

The Indiana Department of Insurance was at all times represented by counsel, Nikolas P. Mann and Lisa Harpenau. Respondents were represented by counsel, Joshua Hague of Krieg DeVault L.L.P., at the August 19, 2008, September 18, 2008, and November 19, 2008 hearings only. Respondents did not attend and were not represented by counsel at the hearing of January 22, 2009. Respondents had notice of the January 22, 2009 hearing.

By Interim Order dated January 23, 2009, the Respondents' insurance producer licenses permanently revoked.

Based upon the evidence presented at the hearings, and after review of said evidence, the ALJ and Ultimate Authority in this matter now makes the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. At the time of all transactions relevant to this matter, Respondents held either a resident or non-resident producer license in Indiana. (See Dep't Rose Ex. 7).

2. Respondents transacted business with the complainants herein from their Indianapolis office located at 11206 Fall Creek Road. *See e.g.* Dep't Charles Kinney Ex. 3; Dep't Smith Ex. 8; Dep't Pracht Ex. 6; Dep't Hess Ex. 5; Dep't Mike Ex. 10 & 25; Dep't Reese Ex. 3 & 11.

3. The Department received a complaint filed by Mr. William Hess (hereinafter referred to as "Mr. Hess"), a Georgia resident, asserting that Respondents misrepresented the amount Mr. Hess could withdraw from his annuity without penalty. (Hr'g Tr. at Part I, p. 31, Dep't Hess Ex. 1).

4. The Department forwarded Mr. Hess's complaint to Respondents for a response. (Hr'g Tr. at Part I, p. 29).

5. Respondents provided to the Department a written response to Mr. Hess's complaint on September 20, 2007, asserting that Mr. Hess was "aware of everything that he was signing because we tell everybody . . . everything there is to know about the product they are buying." (Hr'g Tr. at Part I, p. 35-36; Dep't Hess Ex. 2).

6. Mr. Hess provided the Department a written rebuttal to Respondents' response, asserting that he only met with Respondents in the State of Georgia, that Respondents told Mr. Hess that he would be able to withdraw amounts up to 25% of the value of the annuity after the first year, and that over \$50,000.00 was missing from Mr. Hess's account for two years. (Hr'g Tr. at Part I, p. 37-38; Dep't Hess Ex. 3).

7. Respondents sold Mr. Hess five (5) annuities totaling \$1,079,721.65. (Dep't Rose Ex. 7).

8. Respondents were not licensed to sell annuities in Georgia at the time of application for all five National Western Life annuities. (Dep't Rose Ex. 8).

9. The annuity applications for Mr. Hess's annuities 101044398, 101044399, and 101045968 state that the applications were signed in Louisville, Kentucky (Dep't Hess Ex. 4, 5, & 7) despite Mr. Hess never signing such annuity applications in Louisville, Kentucky (Hr'g Tr. at Part I, p. 27-38; Dep't Hess Ex. 3, 6 & 8).

10. The annuity applications for Mr. Hess's annuities 101051625 and 101052547 state that the applications were signed in Chicago, Illinois (Dep't Hess Ex. 9 & 12.) despite Mr. Hess never signing such annuity applications in Chicago, Illinois. (Dep't Hess Ex. 10, 11 & 13).

11. The applications for Mr. Hess's annuities often listed the amount of policy exchanges different from the amount for which the policy was actually issued. (Dep't Hess Ex. 4, 7, 9, & 12).

12. Respondents forged Mr. Hess's signatures on annuity contracts 101044399 and 101044698. (Hr'g Tr. at Part IV¹, pp. 45 & 47; Dep't Hess Ex. 4 & 5).

13. Mr. Hess discovered \$51,848.52 withdrawn without consent from annuity contracts 0101044398 and 0101044399 through his certified public accountant ("CPA"), Kay Kruger. (Hr'g Tr. at Part IV, p. 50; Dep't Kruger Ex. 1; Dep't Hess Ex. 15 & 16).

14. Upon investigation by Ms. Kruger, it was discovered that the withdrawn money was never deposited into any of Mr. Hess's annuity accounts. (Hr'g Tr. at Part IV, p. 152-53; Dep't Kruger Ex. 1).

15. When questioned by Ms. Kruger, Respondents misrepresented to Ms. Kruger that the funds were held in a "cash account pending return to Mr. Hess's annuity." (Hr'g Tr. at Part IV, p. 154; Dep't Kruger Ex. 1 at Ex. E).

16. When the annuity funds were not returned to Mr. Hess's account, Ms. Kruger further questioned Respondents who then misrepresented that the money was erroneously transferred to another client's account. (Hr'g Tr. at Part IV, p. 155; Dep't Kruger Ex. 1 at Ex. F).

17. After nearly two years, the annuity funds withdrawn without authorization were returned to Mr. Hess's annuity account by Respondents. (Hr'g Tr. at Part IV, p. 156; Dep't Kruger Ex. 1).

18. The Department received a complaint filed by Charles Kinney on behalf of his

¹ Part IV refers to the hearing transcript of January 22, 2009. Because all prior hearing transcripts have been referred to as "Parts," for consistency purposes, the last hearing transcript will hereinafter be referred to as Part IV.

parents, Harold and Margie Kinney, all Georgia residents, on May 9, 2007, asserting that Respondents misrepresented applicable surrender fees associated with various annuities purchased by Harold and Margie, misrepresented the location of where the annuity applications were signed, and withdrew money from Harold and Margie's annuities without their consent. (Dep't Hr. Tr. at Part I, p. 149; Dep't Charles Kinney Ex. 1).

19. Respondents sold Harold and Margie Kinney five (5) National Western Life annuities totaling \$2,039,200.09. (Dep't Rose Ex. 7).

20. Respondents were not licensed to sell annuities in Georgia at the time of application for all five National Western Life annuities. (Dep't Rose Ex. 8).

21. Respondents often sent blank annuity applications to Harold and Margie for signature. (Hr'g Tr. at Part I, p. 153).

22. All five (5) annuity applications for Harold and Margie purported to be signed in Louisville, Kentucky even though the applications were sent to Harold and Margie's home in Georgia. (Hr'g Tr. at Part I, p. 153; Dep't Charles Kinney Ex. 3, 4, 5, 6, 7, & 8).

23. The annuity applications for Harold and Margie's annuities often listed the amount of policy exchanges for amounts much more than, or vastly different from, the amount for which the policy was actually issued. (Hr'g Tr. at Part I, p. 157, 159, 161; Dep't Charles Kinney Ex. 4, 5, 6, & 7).

24. National Western Life annuity contracts 101057778, 101057779, 101057781, and 101057780, which were held by Harold and Margie, were funded with surrendered annuity funds from AmerUs (k/n/a AVIVA) annuities. (Dep't Charles Kinney Ex. 5, 6, & 7).

25. National Western Life annuity contract 101042739 was a Charitable Remainder Trust ("CRT") funded with financial data corporate stock. (Hr'g Tr. at Part IV, p. 162; Dep't

Charles Kinney Ex. 3).

26. The result of the transfer of Harold and Margie's first four AmerUs annuities to National Western Life annuities was \$135,946.10 in surrender fees. (Dep't Kruger Ex. 1).

27. An additional \$15,405.19 in surrender fees was incurred by Harold and Margie as a result of the transfer of the CRT to National Western Life. (Dep't Kruger Ex. 1).

28. All surrender fees have since been refunded by AmerUs to Harold and Margie. (Hr'g Trans. At Part IV, p. 163-64).

29. During the preparation of Harold and Margie's tax return, their CPA, Ms. Kruger, discovered that \$120,248.52 was withdrawn from the CRT annuity without the knowledge or consent of Harold and Margie. (Hr'g Tr. at Part IV, p. 141; Dep't Kruger Ex. 1).

30. When questioned by Ms. Kruger, Respondents misrepresented to Ms. Kruger that the \$120,248.52 withdrawal was an unnecessary distribution which remained in a client suspense account until the requisite paperwork was completed. (Hr'g Tr. at Part IV, p. 142; Dep't Kruger Ex. 1 at Ex. D).

31. Ms. Kruger was never able to verify where the \$120,248.52 withdrawal actually went. (Hr'g Tr. at Part IV, p. 145-46).

32. Nearly a year and a half later, Respondents returned the \$120,248.52 withdrawal in the form of two cashier's checks several days apart to Mr. and Ms. Kinney. (Hr'g Tr. at Part I, p. 216; Hr'g Tr. at Part IV, p. 144; Dep't Kruger Ex. 1).

33. During the course of Respondents' role as Harold and Margie's financial advisor, Harold and Margie paid a total of \$165,029.00 in advisor fees to Respondents, and \$3,606.00 in CPA fees to Ms. Kruger to deal with the issue of the missing \$120,248.52. (Hr'g Tr. at Part I, p. 216-17; Dep't Charles Kinney Ex. 15).

34. The Department received a complaint filed by David Smith, a Georgia resident, asserting that Respondents engaged in deceptive annuity sales practices. (Hr'g Tr. at Part I, p. 239; Dep't Smith Ex. 1).

35. Respondents recommended that Mr. Smith invest his Delta pension in a short term safe investment vehicle while the threat of terrorism was high. (Hr'g Tr. at Part I, p. 236).

36. Respondents actually sold Mr. Smith a National Western Life deferred annuity in the amount of \$847,987.05 with a maximum 10% withdrawal allowance. (Hr'g Tr. at Part I, p. 240; Dep't Smith Ex. 2).

37. Mr. Smith's annuity application says it was signed in Louisville, Kentucky despite Mr. Smith having not been to Louisville, Kentucky in the past decade. (Hr'g Tr. at Part I, p. 241; Dep't Smith Ex. 3).

38. Respondents advised Mr. Smith to surrender portions of his annuity without advising him of any applicable surrender charges, resulting in Mr. Smith paying \$66,670.10 in surrender charges. (Hr'g Tr. at Part I, p. 248, 251, 272; Dep't Smith Ex. 9, 12, & 22).

39. A partial surrender from Mr. Smith's National Western Life annuity in the amount of \$100,000.00 was used to fund another annuity, Fidelity and Guaranty contract L9125408, all of which was accomplished by Respondents without the knowledge of Mr. Smith. (Hr'g Tr. at Part I, p. 252-53; Dep't Ex. 12-15).

40. Three months after Respondents used the money from one of Mr. Smith's partial surrenders from his National Western Life annuity to fund yet another annuity with Fidelity and Guaranty, Mr. Smith immediately and successfully petitioned Fidelity and Guaranty to cancel the annuity. (Hr'g Tr. at Part I, p. 256-263; 279-82; Dep't Smith Ex. 25 & 26).

41. Upon Respondents' attempt to surrender the remaining \$400,000.00 of cash value

in Mr. Smith's annuity, Mr. Smith finally discovered that he would incur substantial surrender fees in the amount of \$115,000.00 as a result of the partial surrender. (Hr'g Tr. at Part I, p. 260).

42. Despite Mr. Smith's protest to the attempted \$400,000.00 withdrawal, Respondents made further attempts to execute the withdrawal. (Hr'g Tr. at Part I, p. 260-261; Dep't Smith Ex. 19).

43. When questioned by Mr. Smith about the surrender fees, Respondents misrepresented to Mr. Smith that no surrender charges would result, and National Western Life's representation that Mr. Smith would incur surrender fees was a ploy to coerce Mr. Smith into keeping his money with National Western Life. (Hr'g Tr. at Part I, p. 264-268; Dep't Smith Ex. 20).

44. Without the assistance of Respondents, Mr. Smith successfully petitioned National Western Life to rescind his annuity without penalty resulting in a full return of premium without interest. (Hr'g Tr. at Part I, p. 277, 283-84).

45. The Department received a complaint filed by Rebecca Pracht on August 28, 2007, asserting that Respondents moved money from Ms. Pracht's Individual Retirement Account ("IRA") into a Fidelity and Guaranty annuity, contract L9124844, without her knowledge or consent. (Hr'g Tr. at Part I, p. 117-118; Dep't Pracht Ex. 1).

46. The Fidelity and Guaranty annuity application contains the purported signature of Ms. Pracht, although she asserts she does not recall signing her name to the application. (Hr'g Tr. at Part I, p. 119; Dep't Pracht Ex. 3).

47. Ms. Pracht did not receive the delivery receipt for the Fidelity and Guaranty annuity, which was issued on July 1, 2006, until October 18, 2006. (Hr'g Tr. at Part I, pp. 120-23; Dep't Pracht Ex. 4, 5 & 6).

48. Upon discovery of the \$10,000.00 transfer from Ms. Pracht's IRA into a Fidelity and Guaranty annuity, Ms. Pracht successfully petitioned Fidelity and Guaranty to rescind the annuity without penalty. (Hr'g Tr. at Part I, p. 124-27; Dep't Pracht Ex. 7 & 8).

49. The Department received a complaint against Respondents from James Michael Kinney ("Mike"), a Georgia resident, on August 18, 2007, asserting that Respondents placed most of Mike's liquid net assets into annuities which were subsequently surrendered and replaced with new annuities, causing unforeseen and unwanted surrender fees in the amount of \$40,000.00 (Hr'g Tr. at Part II, p. 49-50, 57; Dep't Mike Ex. 1.), all of which Respondents failed to disclose to Mike. (Hr'g Tr. at Part II, p. 54-55).

50. Mike's complaint further asserted that \$44,000.00 was missing from his and his wife, Caroline's, annuities for nearly a year, and that Respondents placed Mike in a "419af6" plan which, unbeknownst to Mike, was simply two multi-million dollar life insurance policies requiring substantial annual premiums. (Hr'g Tr. at Part II, p. 49-50, Dep't Mike Ex. 1).

51. Mike and his wife held three (3) annuities with AmerUs for only one (1) year before Respondents recommended that Mike and his wife surrender those AmerUs annuities and replace them with five (5) National Western Life annuities. (Dep't Mike Ex. 3, 4, 5, 9, 10, 11, 12, & 13).

52. Respondent placed Mike and Caroline into five (5) annuities with National Western Life totaling \$709,119.58 (Dep't Rose Ex. 8.), all of which had 10 to 15 years in surrender periods despite Mike's desire to have his assets placed in liquid investment vehicles. (Hr'g Tr. at Part II, p. 56).

53. Respondents were not licensed to sell annuities in Georgia at the time of application for all five National Western Life annuities. (Dep't Rose Ex. 7).

54. Due to the surrender of the AmerUs annuities, AmerUs charged Mike and his wife \$40,117.24 in surrender charges. (Hr'g Tr. at Part II, p. 67-76; Dep't Mike Ex. 6, 7, & 8).

55. When Mike questioned Respondents about these surrender charges, Respondents misrepresented to Mike that National Western Life would pay the surrender charges. (Hr'g Tr. at Part II, p. 57).

56. Had Mike known he would incur substantial surrender charges as a result of this transaction, he would never have agreed to the purchase of the National Western Life annuities. (Hr'g Tr. at Part II, p. 75-6).

57. Applications for National Western Life annuity contracts 101043384 and 101043385 stated that Mike and/or his wife signed them in Louisville, Kentucky, while applications for contracts 101039441, 101049413, and 101050781 stated they were signed in Chicago, Illinois, despite neither Mike nor his wife ever signing annuity documents in Louisville or Chicago. (Hr'g Tr. at Part II, p. 87-91; Hr'g Tr. at Part IV, p. 22 & 25; Dep't Mike Ex. 9, 10, 11, 12, 13, & 14).

58. In May of 2006, Mike discovered that two separate partial surrenders totaling \$44,000.00 from National Western Life annuities, contracts 0101039441 and 010143384, occurred on January 2, 2006, and were endorsed and deposited by Respondents into their business account instead of the appropriate account - Mike's Fidelity brokerage account. (Hr'g Tr. at Part II, p. 120; Dep't Mike Ex. 15, 16, 17, 18 & 22).

59. When Mike confronted Respondents about this missing money, Respondents verbally misrepresented that Respondents attempted to deposit the withdrawals in Mike's collateral account at Fidelity, but the account would not accept deposits. (Hr'g Tr. at Part II, p. 109-112; 120-21).

60. Respondents deposited \$40,000.00 by way of cashier's check into Mike's Fidelity brokerage account on July 3, 2006, seven (7) months after the money was initially withdrawn. (Hr'g Tr. at Part II, p. 127-28; Dep't Mike Ex. 24).

61. When Mike questioned Respondents about the remaining \$4,000.00, Respondents admitted that the mistake was theirs (Dep't Mike Ex. 25.) and repaid the remaining \$4,000.00 a year later. (Hr'g Tr. at Part II, p. 130-31).

62. In 2002, after a very profitable year, Mike sought Respondents' advice in investing \$100,000.00. (Hr'g Tr. at Part II, p. 133).

63. Respondents recommended that Mike invest in a "419af6" plan so that Mike could invest his money in a flexible, tax sheltered vehicle. (Hr'g Tr. at Part II, p. 133-34; 136).

64. In 2002, at Respondents' recommendation, Mike invested \$100,000.00 into the "419af6" plan, but told Respondents that he would likely not be able to invest this amount every year. (Hr'g Tr. at Part II, p. 135).

65. In 2003, at Mike's request, Respondents invested another \$50,000.00 of profits. (Hr'g Tr. at Part II, p. 136).

66. Mike assumed the second \$50,000.00 was invested in the same vehicle as his initial \$100,000.00 investment. (Hr'g Tr. at Part II, p. 136).

67. Mike discovered that Respondents had invested his \$150,000.00 in two (2) separate life insurance policies with face amounts of \$7,563,882.00 and \$2,600,000.00, both of which required annual premiums totaling \$150,000.00. (Hr'g Tr. at Part II, p. 136-37; 144-49; Dep't Mike Ex. 26, 30, & 31).

68. Both policies lapsed because Mike could not contribute the annual premiums to keep the policies in force and he was advised by Respondents that he should no longer invest in

the plan. (Hr'g Tr. at Part II, p. 142-43).

69. Mike recouped \$125,000.00 of the \$150,000.00 in life insurance premiums by August of 2008, five (5) years after the premiums were initially paid. (Hr'g Tr. at Part II., p. 143, 157).

70. During the course of Respondents' role as Mike's financial advisor, Mike incurred \$61,836.99 in advisor fees, \$1,910.15 in attorney fees, and \$5,938.75 in CPA fees as a result of Respondents' management of Mike's insurance products. (Hr'g Tr. at Part II, p. 159-164; Dep't Mike Ex. 37).

71. The Department received a complaint against Respondents from Joe Mazzone, an Alabama resident, in August of 2007. (Hr'g Tr. at Part IV, p. 170-71).

72. In May of 2005, Respondents placed Mr. Mazzone and his wife, Pamela Mazzone, into two (2) separate annuities with National Western Life totaling \$293,000.00. (Hr'g Tr. at Part IV, p. 177-78, 183, & 187; Dep't Mazzone Ex. 4, 5, 7, & 8).

73. The National Western Life applications were purportedly signed in Douglasville, Georgia, despite Mr. and Mrs. Mazzone never signing annuity applications there. (Hr'g Tr. at Part IV, p. 179; Dep't Mazzone Ex. 4 & 7).

74. Respondents forged Mr. and Mrs. Mazzone's initials on the National Western Life annuity disclosure forms. (Hr'g Tr. at Part IV, p. 180-82; 184-85; Dep't Ex. 5 & 8).

75. In May of 2006, only one year later, Respondents surrendered Mr. and Mrs. Mazzone's National Western Life annuities and replaced them with Fidelity and Guaranty annuities, causing the Mazzones to incur over \$50,000.00 in surrender fees. (Hr'g Tr. at Part IV, p. 187-90; Dep't Mazzone Ex. 10, 11 & 12).

76. Respondents never disclosed these surrender charges to the Mazzones despite

Respondents' fraudulent letter of May 19, 2006 purporting to provide such disclosure. (Hr'g Tr. at Part IV, p. 190-91; Dep't Mazzone Ex. 11).

77. The Fidelity and Guaranty annuity applications contained false information which misrepresented the premium amounts to be applied to the annuities. (Hr'g Tr. at Part IV, p. 192-95; Dep't Mazzone Ex. 12).

78. In fact, the Mazzones were not aware their National Western Life annuities had been replaced by Fidelity and Guaranty annuities until the summer of 2007, nearly one year after the annuities were actually issued. (Hr'g Tr. at Part IV, p. 198, 201)

79. When Mr. Mazzone questioned Respondents about the transaction and whether the Mazzones had annuities in their financial portfolio, Respondents misrepresented that the Mazzones had no annuities, misrepresented that Respondents did not earn commissions on any annuities purchased, and furnished a false net worth statement misrepresenting the values in the Mazzones' Fidelity and Guaranty annuities. (Hr'g Tr. at Part IV, p. 208-10, 211; Dep't Mazzone Ex. 16).

80. After Mr. Mazzone questioned Respondents about the false net worth statement detailing his account value at National Western Life, Respondents asserted that it was National Western Life that failed to disclose the surrender fees and they were unaware that a surrender charge would apply. (Hr'g Tr. at Part IV, p. 214-15; Dep't Mazzone Ex. 17).

81. On April 2, 2007, the Department received a complaint from Thomas Coleman Reese, a Georgia resident, against Respondents asserting that Respondents engaged in improper sales practices, and that \$61,000.00 was missing from one of Mr. Reese's annuities for nearly 19 months. (Hr'g Tr. at Part IV, p. 55; Dep't Reese Ex. 1).

82. Respondents recommended that Mr. Reese invest nearly all of his liquid assets in

four National Western Life annuities totaling \$734,045.42 because of the tax advantage of annuities, despite Mr. Reese informing Respondents that he did not like annuities. (Hr'g Tr. at Part IV, p. 61-62, 67; Dep't Reese Ex. 1, 3, 4, 5, & 6; Dep't Rose Ex. 8).

83. Respondents were not licensed to sell annuities in Georgia at the time of application for National Western Life annuities 101049414, 101087271, and 101049418. (Dep't Rose Ex. 9).

84. National Western Life annuity contracts 101049414, 101087271, and 101106239 were purportedly signed in Louisville, Kentucky, and National Western Life annuity contract 101049418 was purportedly signed in Chicago, Illinois, despite Mr. Reese never traveling to either city to sign annuity applications. (Hr'g Tr. at Part IV, p. 63-66; Dep't Reese Ex. 4, 5, & 6).

85. On October 13, 2004, Respondents executed a \$61,000.00 partial surrender from Mr. Reese's annuity. (Hr'g Tr. at Part IV, p. 68-69; Dep't Reese Ex. 12 & 13).

86. The \$61,000.00 partial surrender was deposited into Mr. Reese's broker account with Fidelity Investments, only to be withdrawn by Respondents and deposited into their company account without the consent of Mr. Reese. (Hr'g Tr. at Part IV, p. 99-100, 120-21, 117-18; Dep't Reese Ex. 12, 13 & 15).

87. When Mr. Reese's daughter, Janice McCall, confronted Respondents about this \$61,000.00 partial surrender and discrepancy in Mr. Reese's Fidelity Investments account values in February of 2006, Respondents responded via electronic mail by misrepresenting Mr. Reese's National Western Life annuity account values and by providing a falsified National Western Life statement. (Hr'g Tr. at Part IV, p. 100-102; Dep't Reese Ex. 9).

88. Respondents further asserted to Ms. McCall that they contacted National Western

Life, via letter and phone, in an attempt to fix the account value issues; however, when Ms. McCall contacted National Western Life about this, National Western Life informed Ms. McCall that it had never received any communication from Respondents regarding Mr. Reese. (Hr'g Tr. at Part IV, 84-85; 107-109; Dep't Reese Ex. 10).

89. In later correspondence between Mr. Reese and Respondents, Respondents made additional misrepresentations about where the \$61,000.00 partial surrender monies went including that the error was, in part, due to National Western Life's failure to conduct its due diligence when issuing the check for the surrender monies, despite National Western Life informing Ms. McCall that Respondents had admitted the missing money was their fault. (Hr'g Tr. at Part IV, p. 110-11, 122-24; Dep't Reese Ex. 11 & 17).

90. The \$61,000.00 partial surrender was in fact processed by National Western Life on October 14, 2004, and a check was made payable to Fidelity Investments, but said check was returned by Respondents with instructions to re-issue the check to a new address for Fidelity Investments, which was actually Respondents' address. (Hr'g Tr. at Part IV, p. 112-13; Dep't Ex. 12).

91. Eighteen months after issuance of the original \$61,000.00 partial surrender, Respondents attempted to return the monies, but issued a stop payment on the check instead. (Hr'g Tr. at Part IV, p. 119-20; Dep't Reese Ex. 15 & 16).

92. Three weeks after the issuance of this stop payment, Respondents returned the \$61,000.00 to Mr. Reese. (Hr'g Tr. at Part IV, p. 70).

93. It took 19 months for the full \$61,000.00 to be returned to Mr. Reese. (Hr'g Tr. at Part IV, p. 69; 97-98).

94. Mr. Reese successfully petitioned National Western Life to rescind the annuities

he held for three years without surrender penalties and without any interest earned. (Hr'g Tr. at Part IV, Pg 70-71).

95. Mr. Reese paid \$32,780.63 in advisor fees to Respondents, \$7,785.92 in legal fees, \$400.00 in fees to his CPA, and \$10.00 for the stop payment on the initial repayment check for the missing \$61,000.00. (Hr'g Tr. at Part IV, p. 126-28; Dep't Reese Ex. 18 & 19).

96. On September 14, 2007 National Western Life notified the Department that Respondents had been terminated for cause because several annuity applications contained false information including where the documents were signed. (Hr'g Tr. at Part IV, 80-82; Dep't National Western Life Ex. 1 & 2).

97. National Western Life has since filed suit against Respondents for their failure to return commission payments after numerous annuity contracts were cancelled by National Western Life due to Respondents' conduct. (Hr'g Tr. at Part IV, 88).

CONCLUSIONS OF LAW

1. The Commissioner of Insurance has jurisdiction over this matter pursuant to Indiana Code sections 27-1-1-1 and 27-1-15.6-12(b).

2. The hearings in this matter were held in accordance with the Indiana Administrative Orders and Procedures Act. *See* Indiana Code sections 4-21.5-3 *et seq.*

3. The Department has met its burden in showing by a preponderance of the evidence that Respondents' conduct is contrary to the Indiana Insurance Code and that additional disciplinary action, including restitution and civil penalties, is warranted.

4. Pursuant to Indiana Code section 27-1-15.6-12(b), the Commissioner of Insurance (or his designated ultimate authority) has the authority to levy a civil penalty, place a producer's license on probation, suspend, revoke or permanently revoke a producer's license, refuse to issue

or renew a producer's license, or *take any combination of these actions* for engaging in any of the enumerated acts found therein. (Emphasis added).

5. Pursuant to Indiana Code section 27-1-15.6-12(f), the Commissioner of Insurance (or his designated ultimate authority) has the authority to issue a civil penalty in an amount up to \$10,000.00 for engaging in any of the enumerated conduct in Indiana Code section 27-1-15.6-12(b).

6. Such \$10,000.00 penalty can be imposed per each violation of Indiana Code section 27-1-15.6(b) supported by independent facts and circumstances, to avoid: (a) the unnecessary burden of the Department filing a separate statement of charges for each violation of Indiana Insurance Code; and (b) the disparate result of a respondent misappropriating hundreds of thousands of dollars and misrepresenting numerous insurance documents while only facing a maximum total penalty of \$10,000.00.

7. Pursuant to Indiana Code section 27-1-15.6-12(m), the Commissioner of Insurance (or his designated ultimate authority) can order restitution if Respondents have engaged in misappropriation or used fraudulent, coercive, and dishonest practices, or demonstrated complete incompetence, untrustworthiness, and financial irresponsibility in their business dealings.

8. Respondents violated Indiana Code section 27-1-15.6-12(b)(4) seven (7) times when they improperly withheld, misappropriated, or converted the annuity monies of Harold and Margie Kinney (Findings, para. 29-32), James Mike Kinney (Findings, para. 58), Joe and Pamela Mazzone (Findings, para. 75), Thomas Coleman Reese (Findings, para. 85-89), David Smith (Findings, para. 39-40), Rebecca Pracht (Findings, para. 45-48), and William Hess (Findings, para. 13-17) as set forth above.

9. Respondents violated Indiana Code section 27-1-15.6-12(b)(5) nine (9) times when they intentionally misrepresented pertinent facts on various annuity applications and intentionally misrepresented the terms of the annuity products to Harold and Margie Kinney (Findings, para. 23), James Mike Kinney (Findings, para. 52), Joe and Pamela Mazzone (Findings, para. 76-79), Thomas Coleman Reese (Findings, para. 87), David Smith (Findings, para. 35-36), Rebecca Pracht (Findings, para. 45-48), and William Hess (Findings, para. 3) as set forth above.

10. Respondents violated Indiana Code section 27-1-15.6-12(b)(10) three (3) times when they forged the names or initials of Joe and Pamela Mazzone (Findings, para. 73, 74), and William Hess (Findings, para. 12) on the annuity applications and documents.

11. Respondents violated Indiana Code section 27-1-15.6-12(b)(8) nine (9) times when they used fraudulent, coercive, and dishonest practices, and demonstrated incompetence, untrustworthiness, and financial irresponsibility in Indiana and elsewhere in transactions with Harold and Margie Kinney (Findings, para. 22), James Mike Kinney (Findings, para. 57), David Smith (Findings, para. 37), William Hess (Findings, para. 9), Thomas Coleman Reese (Findings, para. 84), Joe and Pamela Mazzone (Findings, para. 73), and National Western Life (Findings, para. 90) as set forth above.

12. Therefore, Respondents have, at a minimum, violated the Indiana Insurance Code a total of twenty-eight (28) times warranting a civil penalty for each violation.

13. Findings of Fact that can be adopted as Conclusions of Law are hereby incorporated as such.

FINAL ORDER

1. Respondents pay to the Department a civil penalty in the amount of \$10,000.00

per violation of the Indiana Insurance Code, as set forth above, for a total civil penalty in the amount of \$280,000.00. Said civil penalty is due sixty (60) days from the date of this Final Order by certified check or money order made payable to the Indiana Department of Insurance.

2. Respondents pay restitution to Harold and Margie Kinney in the amount of \$168,635.00. (\$165,029 in advisor fees plus \$3,606 in CPA fees equals \$168,635.)

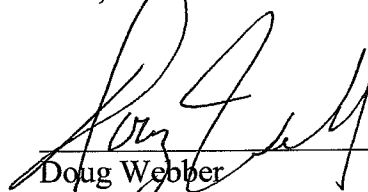
3. Respondents pay restitution to Mike Kinney in the amount of \$94,685.89. (\$25,000 in unreturned insurance premium plus \$61,836.99 in advisor fees plus \$1,910.15 in attorney fees plus \$5,938.75 in CPA fees equals \$94,685.89.)

4. Respondents pay restitution to Thomas Coleman Reese in the amount of \$40,976.55. (\$32,780.63 in advisor fees plus \$7,785.92 in legal fees plus \$400 in CPA fees plus \$10 for a returned check fee equal \$40,976.55.)

5. Total restitution in the amount of \$304,297.44 is due sixty (60) days from the date of this Final Order with proof of payment via copies of the certified checks or money orders sent by certified mail to the Indiana Department of Insurance at 311 West Washington Street, Suite 300, Indianapolis, Indiana 46204.

6. The Interim Order dated January 23, 2009 permanently revoking Respondents' insurance producer licenses is hereby adopted and incorporated into this Final Order.

ALL OF WHICH IS ORDERED this 19th day of March, 2009


Doug Webber
Administrative Law Judge and
Appointed Ultimate Authority

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